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No. 89-547

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF OHIO

Petitioner,

v.

TERESA BOOHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE COURT
OF APPEALS FOR THE THIRD APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I. WHERE INTERROGATION OF AN ACCUSED FOLLOWS A REQUEST FOR COUNSEL AND AN INTENTIONAL VIOLATION OF THE ACCUSED'S RIGHTS TO COUNSEL AND TWO HOURS LATER THE ACCUSED IS READVISED OF HER *MIRANDA* RIGHTS BUT STILL WITHOUT COUNSEL ASKS A DETECTIVE IF THE PROMISED HELP REMAINED AVAILABLE, MAY THE TRIAL COURT PROPERLY FIND THAT A SUBSEQUENT CONFESSION WAS VOLUNTARY AND ADMISSIBLE AS A VOLITIONAL ACT ON THE PART OF THE DEFENDANT?

II. WHETHER A STATE APPELLATE COURT CAN REVERSE A STATE TRIAL COURT'S DECISION NOT TO SUPPRESS A CONFESSION WHEN THE STATE APPELLATE COURT DETERMINES THE STATE TRIAL COURT OVERLOOKED THE TOTALITY OF THE CIRCUMSTANCES AND THE STATE TRIAL COURT ARRIVED AT AN ERRONEOUS CONCLUSION OF LAW ON THE ISSUE OF DISSIPATION OF THE TAINT CREATED BY THE INITIAL COERCIVE CONDUCT OF THE INTERROGATORS.

III. SHOULD THE EXCLUSIONARY RULE RELATING TO STATEMENTS BE CONTINUED TO EFFECTIVELY DETER POLICE MISCONDUCT AND PROVIDE INCENTIVES FOR THE LAW ENFORCEMENT PROFESSION TO CONDUCT ITSELF IN ACCORD WITH AN ACCUSED'S CONSTITUTIONAL RIGHTS.

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Petitioner,

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TERESA BOOHER,

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RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF
CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD
APPELLATE DISTRICT OF OHIO

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

United States Constitution, Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when the actual service in time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

a) Proceedings in the Supreme Court of Ohio

On February 13, 1989, Petitioner filed a Brief with the Supreme Court of the State of Ohio alleging the following Propositions of Law:

- I. When a confession is so far removed in time and manner from an earlier period of questioning so as to dissipate the effect of any coercive elements upon the free will of the Defendant which existed during that period of questioning and when this confession was given immediately after being advised of one's *Miranda* rights, it is admissible as a volitional act on the part of the Defendant.
- II. When substantial credible evidence has been presented to support a judgment in a Trial Court, an Appellate Court abuses its discretion when it substitutes its judgment for that of the Trial Court as to the weight of the evidence and when it disregards the facts as determined by the trier of fact and substitutes its opinion regarding those facts.

On March 14, 1989, Respondent filed a brief with The Supreme Court of Ohio alleging the following Propositions of Law:

- I. When a confession follows so close in time and manner to an earlier period of tainted questioning so that the coercive elements which existed upon the free will of the Defendant continue to persist, the subsequent confession is involuntary and inadmissible as a volitional act on the part of the Defendant.
- II. An Appellate Court has the power to reverse the decision of the Trial Court only if the judgment is manifestly against the weight of the evidence, and in this reviewing process the Appellate Court is limited to deciding issues of law.

On July 5, 1989, The Supreme Court of Ohio dismissed the case *sua sponte*, as having been improvidently allowed. A Motion for Reconsideration was immediately filed by Petitioner and subsequently denied on August 4, 1989.

b) Proceedings in the Court of Appeals, Third Appellate Judicial District, Ohio.

On November 20, 1987, Respondent Booher filed an Appellate Brief alleging the following four Assignments of Error:

- I. The Trial Court erred by denying the Defendant effective assistance of Counsel.

- II. The Trial Court erred in failing to grant Defendant's Motion to Suppress the statements and alleged confession given to various law enforcement officers on February 21, 1986, relating to the death of her husband.
- III. The Trial Court erred in failing to grant Defendant's Motion for Change of Venue.
- IV. The Trial Court abused its discretion by failing to grant Defendant's Motion for New Trial.

The Appellate Court ruled that the Trial Court had erred in failing to grant the Defendant's Motion to Suppress the second statement and alleged confession given to Detective Wood of the Defiance City Police Department, reversed the judgment of the Trial Court, and sent the cause back to the Trial Court further proceedings.

c) Proceedings in State Court.

Respondent, Teresa Booher, was arrested on February 20, 1986, and charged with premeditated murder of her husband, Patrolman Gary Booher. Respondent was indicted in the Defiance County Court of Common Pleas on one count of Aggravated Murder with a Specification for use of a firearm during the commission of the crime.

The Respondent subsequently filed a Motion to Suppress all of her statements. This Motion was heard on April 19, 1986, by Judge Sumner Walters in the Defiance County Court of Common Pleas. The Court found that Respondent's statements, that were given to law enforcement officers prior to 12:00 midnight on February 20, 1986, were inadmissible, but that her statement given to Detective Wood between 2:15 a.m. and 4:00 a.m. on February 21, 1986, was admissible.

On June 9, 1986, Respondent's case was tried in the Defiance County Court of Common Pleas. The State in its case in chief called Detective G. W. Wood, who testified about the confession that was given to him by Respondent during the early morning hours of February 21, 1986. The Jury returned with a verdict of guilty to Aggravated Murder with a Firearm Specification and Respondent was subsequently sentenced to life imprisonment.

On November 20, 1986, Respondent filed an Appellate Brief with the Court of Appeals of the Third Appellate Judicial District of Ohio alleging, among other things, that the Trial Court erred in failing to

grant Respondent's Motion to Suppress all the statements and confession given to law enforcement officers on February 20, and 21, 1986, relating to the death of her husband. On September 15, 1988, the Court of Appeals of the Third Appellate Judicial District of Ohio ruled that the Trial Court had erred when it failed to grant Respondent's Motion to suppress her statements and confession, reversed the judgment, and remanded it to the Trial Court for further proceedings.

Petitioner subsequently appealed the decision to the Ohio Supreme Court. The case was initially allowed, briefed and orally argued. Then on July 5, 1989, the cause was dismissed *sua sponte* by the Supreme Court of Ohio, as having been "improvidently allowed." A Motion for Reconsideration was filed by Petitioner and was subsequently denied on August 4, 1989.

d) Facts.

On February 20, 1986, at approximately 11:30 a.m., the Defiance, Ohio, City Police Department received a call on the 911 emergency number requesting assistance at 1221 Shawnee Drive in Defiance. The call was placed by Respondent who informed the police that her husband, Patrolman Gary Booher, had been shot. Upon their arrival, officers and rescue members were directed towards the bedroom by the Respondent where they discovered the body of Gary Booher lying in his bed, dead from a gunshot wound to the head. The Defiance County Coroner was thereafter summoned to the residence and pronounced the victim dead.

The Respondent was then taken to the Defiance Police Department for questioning at approximately 12:30 p.m. She was read the *Miranda* warnings at approximately 1:05 p.m., at which time questioning began. For the next fifteen (15) hours or more, the Respondent was confined in a small interrogation room at the police station, with the exception of approximately two (2) hours during which she was placed in a jail cell.

During that whole period of time, police officers and their staff were the only people she had any contact with. She did not have any contact with her friends or relatives who were waiting in the building, nor was she told they were there. She was subjected to interrogation by members of the Defiance Police and Sheriff's Departments, who were the friends and co-workers of her deceased husband. As many as nine (9) different officers, detectives, or staff members participated in this process of interrogation at various times throughout this fifteen (15) hour period. She was not given any food during this time, and sometimes the officers intentionally withheld coffee and cigarettes from her.

Throughout the interrogation, law enforcement officers made promises of help if she would admit what they knew was the truth. Furthermore, the officers continually stated that she was not telling the truth, and that the truth was a lie. Law enforcement officers threatened her with the death penalty, called her names, and misled and confused the Respondent.

At approximately 11:30 p.m. on February 20, 1986, the Respondent invoked her right to counsel; she requested an attorney. This request was made to the Prosecuting Attorney, because, as the Respondent testified, "The only lawyer I knew was him." The Prosecutor had been the Boohers' private attorney.

After the request for counsel, the interrogation immediately continued, with questioning by Chief Shock, Detective Wood, and the Prosecuting Attorney. This was done with full knowledge and intent to violate Respondent's rights, with knowledge that any statements would be suppressed. The police admit that solving the homicide was more important than Respondent's Fifth Amendment rights or due process. The Respondent had not received an attorney, and was not re-advised of her *Miranda* rights. At approximately midnight on February 20, 1986, the Respondent was placed in a jail cell. Respondent was advised she was indeed being charged with aggravated murder just as they had threatened.

After approximately two (2) hours of incarceration, the Respondent asked the jailer to contact Detective Wood. Upon his return, she was again placed in the interrogation room. She stated that she just wanted to ask him a couple of questions about helping her as he had promised; and that was all she intended. The Detective then proceeded to go through the *Miranda* warnings, after which he immediately began interrogating the Respondent again. The first question asked was whether the officer could still "help her" as he had promised before midnight and prior to her being charged. The officer still promised "help" to the Respondent in exchange for a confession. After some period of time, she finally stated what the officers felt was a confession. Thereafter, the officers continued with some questioning which they stated was "off the record".

The Respondent opposes a Writ of Certiorari as the decisions of the Third Appellate Judicial District of Ohio and The Supreme Court of Ohio have correctly upheld Amendment V of the United States Constitution and the prior decisions of this Honorable Court in a determination that the State Trial Court erred in finding that a subsequent confession was voluntary and admissible as a volitional act on the part of the

Respondent, particularly where a respondent's right to counsel was intentionally and flagrantly violated. The Court decided this case on totality of the circumstances, following numerous decisions previously rendered by this Court.

REASON FOR DENYING THE WRIT

THE SUPREME COURT OF OHIO AND THE APPELLATE COURT FOR THE THIRD JUDICIAL DISTRICT OF OHIO CORRECTLY DETERMINED THAT WHERE INTERROGATORS INTENTIONALLY VIOLATE AN ACCUSED'S ASSERTION OF HER RIGHT TO COUNSEL AND CONTINUE QUESTIONING MAKING REPEATED PROMISES OF HELP AND TWO (2) HOURS LATER THE ACCUSED IS RE-ADVISED OF HER RIGHTS AFTER ASKING A DETECTIVE IF THE PROMISED HELP IS AVAILABLE, THE TRIAL COURT ERRED IN FINDING THE SUBSEQUENT CONFESSION ADMISSIBLE.

AN INTENTIONAL VIOLATION.

a) Introduction

The Respondent was taken to the Defiance City Police Department for questioning at approximately 12:30 p.m. on February 20, 1986. Fifteen (15) hours of intense interrogation followed with the exception of approximately two (2) hours during which the Respondent was placed in a jail cell. As many as nine (9) different officers, detectives, or staff members participated in the interrogation process. Respondent had no contact with friends and relatives who were waiting in the building, nor was she told of their presence. Respondent was not given any food during this time, and the officers intentionally withheld coffee and cigarettes from the Respondent. Law enforcement officers made repeated promises of help if the Respondent would admit what they knew was the truth.

At approximately 11:00 p.m. on February 20, 1986, Respondent invoked her right to counsel requesting an attorney. Despite the request for counsel, interrogation immediately continued. The prosecutor and interrogators admittedly made a conscious choice to intentionally and flagrantly violate Respondent's rights. Approximately midnight on February 20, 1986, the interrogators made good their threats and advised the Respondent that she was being charged with aggravated murder and placed her in a cell at the Defiance County Jail.

After approximately two (2) hours of incarceration, the Respondent asked the jailer to contact Detective Wood. Upon his return, Respondent was again placed in the interrogation room. Respondent stated that she just wanted to ask him a couple of questions about the promised help; and that was all she intended. The detective immediately began interrogating the Respondent again after going through the *Miranda* warnings. The officer continued to promise help in exchange for a confession. After some period of time, Respondent finally stated what the officers felt was a confession.

Detective G. W. Wood of the Defiance City Police Department testified at trial that Respondent confessed to the murder during the early morning hours of February 21, 1986.

b) Law

The Fifth Amendment to the United States Constitution guarantees that "no person shall be compelled to be a witness against himself." A confession obtained by the use of inherently coercive police conduct must be suppressed where an examination of the totality of the circumstances reveals that such outrageous conduct renders a subsequent confession involuntary and against the free will of the accused. This proposition of law finds support in case law dating back to *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183 (1897). In *Bram*, this Court ruled that a confession not freely given is not to be used at trial. Numerous cases have elaborated on when a statement is not voluntary. The true test of admissibility is whether the confession is made freely, voluntarily and without compulsion or inducement of any sort. *Bram v. United States*, *supra*.

The very fact is custodial interrogation exacts a heavy toll on individual liberty. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The government by its own efforts must unearth the evidence against a suspect and may not procure it from the accused against his will. *Id.* In addition to the confession being voluntary, the prosecution maintains the additional burden of showing that the accused knowingly and intelligently waived the right to counsel and the privilege against self-incrimination contained in the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The Petitioner relies upon this Court's decision in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981) and *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830 (1983) for the proposition that once an accused himself initiates further communication, exchanges, or conversation with the police about the investigation, a waiver of the

accused's right to counsel is admissible, if, in light of the surrounding circumstances, the waiver was made knowingly and intelligently.

The facts of these cases are in apposition to the instant case. When the Defendants in *Edwards* and *Bradshaw* initially invoked their right to counsel, all interrogation ceased as required by *Miranda*. In the instant case, Respondent was told she had the right to remain silent and to have an attorney. When that right was asserted, it was ignored by the interrogators. No attorney was provided, but the interrogation continued. The interrogators admittedly made a knowing decision to flagrantly violate the Respondent's rights. The effect of this action was to render any subsequent reading of the *Miranda* rights meaningless.

The Petition further relies on this court's decision in *Oregon v. Elstad*, 407 U.S. 298, 105 S.Ct. 1285 (1985). In *Elstad*, this Court held that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

In *Elstad*, *Miranda* rights were not given to the defendant prior to his confession. The *Miranda* rights were subsequently given and the defendant again confessed. The subsequent confession was held to be admissible. In the case at issue, the Respondent was given her *Miranda* rights. She invoked those rights by requesting counsel. Interrogation continued rendering any subsequent reading of *Miranda* rights meaningless, clearly different from the mere lack of giving *Miranda* rights.

Since the Respondent's rights were rendered meaningless, her only source of assistance was the interrogators who had repeatedly promised help. The Court of Appeals' Opinion cites numerous examples of assurances of help by the interrogators. "Help" was in some places related to recommendation to be made to the Prosecutor. The Court of Appeals Opinion cites the following examples of offers of help made by the interrogators prior to midnight:

a) "I know you want to tell us about it, the *only way we're gonna be able to help you Terri is if you cooperate entirely.*"

b) "In order for us to and I'm we we gotta answer to the prosecutor of, in order for us to help you you're gonna have to be flat out honest with us, I mean flat out don't put any thing back because if your flat out honest and I'm gonna be flat out honest with you. In order to get any help from us Terri, we're gonna need some help with this okay."

c) "GW: If you'd have been if if you were really ah it was an accident, you'd call wouldn't ya? Now wait, now Terri, don't get upset just tryin to give you get you to where to understand me, *and for me to help you Terri we've gotta have the whole truth.* I don't want to go through another five hours or four hours or two hours like we've been through I don't think it's necessary at this point. I think you your talkin around and you're gonna tell us everything that's involved in this, it's gonna be brought up. Anyhow, even though and on your way or noth another when we involve other people in it whether you want to take it all yourself, this is the way it's gonna be. *Alright, because I'm not gonna have the final say so in what happens the Prosecutor is and if you co-operate entirely with us then I can get with the prosecutor and keep this simple as possible,* if there's any flaws in this which I'm sure he sees em now, he's thinkin just like everybody else is then he's gonna say bullcrap we're goin the other way alright? *If you co-operate with us now tell us the truth, I'm sure he's gonna go along with us alright?"*

"GW: And then it's gonna be you that's gonna be hurt and then I'm gonna be hurt, cause then I've got to live with it the rest of my life, but I've been staying here long enough to talk to you to get the truth out of you *so I can help ya do you standstad that? ****"

"GW: No come on will ya Terri, Terri, you've want this far got the rest of the way give me a break, *I want to help you Terri come on.*"

"PS: Terri, you know these guys have been real patient with you, they would have they wouldn't have been this patient with anybody else they would have quit a long time ago. But they know and I know that you're not levelin with us, you're not there's something you're not tellin us, we're gonna find out and we're gonna have to go on what you did tell us, and what Bill and Dave is tryin to the jury's gonna know *do you want us to help you?*

"TB: Yes.

"PS: *Really want us to help you?*

"TB: Yes.

"PS: Okay, then could you just tell us exactly what happened ***?"

"PS: And then what, Terri all the guys talked to you tonight, *Dave's the one that wants to help you the most*, you know that don't ya? And he told you that okay,"

"GW: *** I don't think you believe that we're *gonna help*.

"TB: Yes, I do believe you're gonna help."

"PS: *** So you might as well tell us what really happened and then we can go from there, that's *the only way we're gonna be able to help ya*."

"GW: Terri, come on Terri, *I got I want you to help, alright, do you want my help?*

"TB: Yes."

"GW: *** *we talked to ya how are we gonna help ya Terri if you're not gonna help you self, and you're not gonna do it are you?*"

"GW: *** You're gonna have to tell the truth Terri it's got to come out. Come on Terri help us so we can help you, Terri help us so we can help you tell me the truth, *and I'll help ya, I gotta have something to help ya with, come on, okay*, Terri Terri, it's just you and me now, alright, now tell me the truth, tell me the truth, and I'll help ya, Terri ***."

Respondent's right having been rendered meaningless; the Respondent sought the only source of assistance available. The Respondent asked the jailer to contact Detective Wood. The first thing the Respondent said when Detective Wood returned and placed the Respondent in the interrogation room was, "You can still help me?" The references to "help" did not disappear. Shortly thereafter Detective Wood says:

**** I don't think you can honestly say, looking me in the face, that I've never been, deceived you in any way and I helped you the last time, is that not correct? Yes or No.

"I told you "I'd help you this time but I gotta know the truth ****"

The Respondent did not seek a generalized conversation about the investigation. Her sole interest was to determine if the promised "help" was still available, and nothing more.

The Respondent's Fifth Amendment privilege against self-incrimination and the Respondent's rights under *Miranda* were intentionally violated. The subsequent confession is inadmissible as it was tainted by the violation of Respondent's rights.

CONCLUSION

This Court has before it a case involving a federal question that was correctly decided by the Supreme Court of Ohio and the Court of Appeals of the Third Appellate District of Ohio. The Court of Appeals ruled that the illegalities surrounding a prior interrogation must be sufficiently purged, considering the totality of the circumstances, to eliminate the taint created by prior misconduct.

This ruling is in accord with the Fifth Amendment of the United States Constitution and prior cases decided by this Court.

For these reasons a Writ of Certiorari should be denied.

REASON FOR DENYING THE WRIT

THE COURT OF APPEALS FOR THE THIRD APPELLATE DISTRICT OF OHIO CORRECTLY DETERMINED THAT THE STATE TRIAL COURT OVERLOOKED THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING A SUBSEQUENT CONFESSION WHICH HAD BEEN TAINTED BY AN EARLIER PERIOD DURING WHICH THE RESPONDENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION HAD BEEN VIOLATED AND THAT THE STATE TRIAL COURT ARRIVED AT AN ERRONEOUS CONCLUSION OF LAW ON THE ISSUE AS TO DISSIPATION OF THAT TAINT.

a) Law

While voluntary waiver and voluntary confession are separate issues, the same test is used to determine both, i.e., whether the action was voluntary under the totality of the circumstances. *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336 (1963); *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338 (1967).

Although the making of a statement under conditions which preclude the admissibility of the statement does not disable the maker from making a usable statement after the conditions which contributed to the making of the first statement have been removed, this Court and other

Courts that have addressed this issue have looked to the totality of the circumstances surrounding the second confession or statement. *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336 (1963); *United States v. Bayer*, 331 U.S. 532, 67 S.Ct. 1394 (1947).

If the totality of the circumstances surrounding the second confession indicate that it was involuntarily given, it will not be admitted into evidence.

A list of factors has been provided to consider in examining the totality of the circumstances to determine if the taint from earlier unlawful interrogations had dissipated prior to a later confession. The factors include the following:

1. The continuation of the same environmental circumstances.
2. Any promises of help.
3. Effective *Miranda* warnings.
4. Temporal proximity of the coercive factor and the confession or waiver of the right to remain silent.
5. Flagrancy of police misconduct.
6. Age, maturity, and mental stability.

The first factor considered is whether the same environmental circumstances which rendered the prior interrogations illegal continued to exist at the time of subsequent interrogations. The persistence of the conditions that caused the initial illegal coercion will result in a continued taint at the time of a later confession. *United States v. Bayer*, 331 U.S. 532, 67 S. Ct. 1394 (1947).

In *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338 (1967), a written confession of a state court defendant who was convicted of murdering his wife, which confession followed two earlier confessions and was obtained nine (9) days after the defendant was taken into custody, was not voluntary and was not admissible into evidence, where the facts showed (1) there was no break in the stream of events following the time defendant was taken into custody sufficient to insulate the confession from the circumstances surrounding two earlier confessions, (2) during the period of custody the defendant was not assisted by counsel and was never fully advised that he could consult counsel.

In *Clewis*, the defendant was not fully advised of his right to counsel. The situation in the instant case is worse. The Respondent was advised of her right to counsel; however, when the right was revoked, it

went unheeded. Interrogation continued which rendered her rights meaningless.

The Court of Appeals expressly stated on p. 13 of their Opinion what facts and the source they were relying on. They further addressed this issue in their opinion relying on *State v. Arrington*, 14 Ohio App. 3d 11 (1984) which relied on *Mincy v. Arizona*, 437 U.S. 385 98 S.Ct. 2408 (1978) and *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612 (1976). These cases clearly allow a review of the facts.

A review of the evidence showed that certain decisions were against the manifest weight of the evidence. On other occasions they found that as a matter of law the conclusion of the trial Judge was incorrect. Most importantly the Court of Appeals said ". . . that the trial court overlooked certain circumstances and arrived at an erroneous conclusion on the issue as to dissipation of the taint created by the coercive conduct." (p. 15-16 of Opinion). In other words, the trial court used the wrong standard of review.

First, as to matters not supported by the manifest weight of the evidence, the Court of Appeals said that the Trial Judge erred by finding that the two (2) hour break dissipated the taint and supported this position by citing several circumstances that were clear in the record, i.e. no food whether offered or not, no evidence of sleep, and no significant rest period.

Secondly, certain findings were found to be contrary to law such as the intentional violation of her right to counsel is significant and flagrant, contrary to the finding at trial.

Finally, the Appellate Court cited numerous promises of help by the police and requests for help by the Respondent which the Trial Court did not consider or address in its opinion. Similarly, the Court failed to consider flagrant disregard of Respondent's right to counsel when considering the subsequent reading of her *Miranda* rights.

However, of most importance is the fact that the Trial Court did not add up all factors for the totality of the circumstances. As a matter of law, the totality must be considered to determine the reliability of the confession. In this case there were very few factors indicating reliability, and overwhelming evidence of influence by the police. As a matter of law and evidence, there was not a decision supported by the manifest weight of the evidence. As stated by the Court of Appeals, at Page 24, "We . . . conclude that the state failed to establish by a preponderance of the evidence that the confessions taken after midnight on February 20, 1986, were voluntary. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619 (1972)."

Such a statement does not change facts, but goes to the manifest weight of the evidence as desired by Appellant.

The Appellate Court held that the failure of interrogators to cease questioning was a flagrant disregard of Respondent's rights. Not only was this interrogation flagrant, but nullified Respondent's belief in her rights which carried over to the subsequent period.

Other factors for consideration include Respondent's age, maturity and mentality which had to be affected by the events of the day, i.e., no food, no sleep, long interrogations, death of spouse, kept from family, isolated, no coffee at times, no cigarettes at times, violation of rights and no attorney.

The totality of circumstances demonstrates that Respondent's confession was purely a product of an earlier illegal confession. The common sense question in this case is whether the second confession was purely a product of Respondent's knowing and voluntary "free will."

What was Respondent's motivation to confess at 2:00 a.m.? Respondent's motivation was fear and promises of help. Respondent's fear was induced by police action and illegal interrogation for hours on end. Respondent's motivation was to secure the "help" which she was promised for saying what police wanted to hear. Due to the previous deprivation by the police of any "help" (counsel), Respondent reasonably believed her only source of help would be the police; and the price of that help was a confession.

Petitioner's reliance on the second giving of *Miranda* rights constitutes a belief that magic words will wipe out all their previous wrongdoing.

The totality of circumstances clearly demonstrates that the confession was involuntary and improperly obtained.

CONCLUSION

Respondent's confession was involuntary and inadmissible into evidence as a volitional act. The coercive elements which existed upon the free will of the Respondent from the earlier period of tainted questioning continued to persist two (2) hours later at the time of confession. Due to the extensive period of coercive interrogation and numerous offers of "help" the Respondent was incapable of knowing and intelligently waiving her rights against self-incrimination and her right to counsel.

When all of the factors are considered, not only individually, but

also a part of the totality of the circumstances, it is clear that Respondent's confession was not made freely, voluntarily, and without compulsion or inducement.

The environmental circumstances which rendered the prior interrogations illegal persisted at the time of confession. The continuance of interrogation took place in the same room, with the same interrogator, with no rest and no food, and only a two-hour hiatus in the interrogation period during which time Respondent was incarcerated.

The presence of inducements, in the form of offers of "help" if Respondent told the interrogators what they wanted to hear, renders the waiver decision involuntary and the subsequent confession inadmissible.

Respondent's *Miranda* rights were knowingly and willfully violated by interrogators during the period of coercive questioning rendering these rights meaningless to Respondent. Respondent has demonstrated that the effective nullification of her rights and numerous offers of "help" carried over into the subsequent period rendering her waiver of rights the product of prior coercion and not a knowing and intelligent relinquishment.

The impact of the interrogators' illegal conduct and repeated offers of help over a period of thirteen (13) hours of intensive interrogation is not erased by a short two-hour time span.

Official misconduct by police was purposeful and flagrant. Continuance of questioning after Respondent invoked her right to counsel was done knowingly and voluntarily, effectively rendering her rights meaningless.

The Court of Appeals for the Third Appellate District of Ohio examined the totality of the circumstances surrounding the Respondent's confession with this Court's prior decisions and correctly determined that the confession was not freely and voluntarily made, and was in violation of Respondent's Fifth Amendment privilege against self-incrimination.

Respondent submits that the Court of Appeals' decision is correct and a Writ of Certiorari should be denied.

REASON FOR DENYING THE WRIT

THE EXCLUSIONARY RULE RELATING TO STATEMENT SHOULD BE CONTINUED TO DETER POLICE MISCONDUCT AND PROVIDE INCENTIVES FOR THE LAW ENFORCEMENT

PROFESSION TO CONDUCT ITSELF IN ACCORD WITH AN ACCUSED'S CONSTITUTIONAL RIGHTS.

a) Law

The Exclusionary Rule as it applies to statements and confessions promotes adherence to an accused's Constitutional rights. Enforcement of an accused's rights by denying admission of a coerced or tainted confession deters interrogators from usurping their power to intentionally violate an accused's rights. This Court outlined the justification for the Exclusionary Rule as it applies to Fourth Amendment questions in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, (1984). The Exclusionary Rule attempts to balance the competing goals of deterring official misconduct and admitting all evidence which exposes the truth. *Id.*

This Court further states in *Leon*:

“***whether connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial—is a product of considerations relating to the exclusionary rule and the constitutional principles it is designed to protect. *Dunaway v. New York*, 442 U.S. 200, 217-218 (1979); *United States v. Ceccolini*, ____ U.S. ____, ____ S.Ct. ____, 279 (____). In short, the “dissipation of the taint” concept that the Court has applied in deciding whether exclusion is appropriate in a particular case “attempts to mark the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.” *Brown v. Illinois*, *supra*, at 609 (POWELL, J. concurring in part) Not suprising in view of this purpose, an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus. *Dunaway v. New York*, *supra* at 218; *Brown v. Illinois*, *supra* at 603-604.

To suppress a confession which is the product of intentional and flagrant police misconduct which renders an accused's rights meaningless comports with the intent of the Rule.

CONCLUSION

Suppression of illegally obtained confessions deters police misconduct and serves to promote observance of an accused's Constitutional rights. The Supreme Court of Ohio and the Court of Appeals for the Third Judicial District of Ohio correctly determined that the Respondent's confession should be suppressed after examination of the totality of the circumstances. The Writ of Certiorari should be denied.

Respectfully, submitted,

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